Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO *and* L. M. Ericsson Telecommunications, Inc., New York Division. Case 29-CC-720

September 16, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On February 6, 1981, Administrative Law Judge Robert T. Snyder issued the attached Decision in this proceeding. Thereafter, the General Counsel and Respondent filed exceptions and supporting briefs, and the General Counsel and the Charging Party filed briefs in answer to Respondent's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO, Queens, New York, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

IT IS FURTHER ORDERED that the complaint allegations not specifically found herein be, and they hereby are, dismissed.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT apply our bylaws in such a manner as to induce or encourage any member employed by Allran Electric Corp., or any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal in the course of his employment to perform any services, or in such a manner as to restrain or coerce Allran or any other person engaged in commerce or in an industry affecting commerce where, in either case, an object thereof is to force or require Allran, or any other person engaged in commerce or in an industry affecting commerce, to cease doing business with L. M. Ericsson Telecommunications, Inc., New York Division.

WE WILL NOT in any other manner induce or encourage any member employed by a person engaged in commerce or in an industry affecting commerce to engage in action proscribed by Section 8(b)(4)(i) or (ii)(B) of the National Labor Relations Act, as amended, in connection with enforcing a work jurisdiction claim on projects on which Ericsson or any other manufacturer, distributor, or installer of private telephone switching system is employed as general contractor.

We hereby notify each of our members that no provision in our bylaws is intended to suggest or require that any member refuse, in the course of his employment, to perform any services because work falling within our claimed jurisdiction is assigned to or being performed by other tradesmen or other persons not in the employ of the member's own employer or over whom he has no control.

LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge: This case was initiated by a charge filed on June 17, 1980, by L. M. Ericsson Telecommunications, Inc., New York Di-

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Respondent also has excepted to the Administrative Law Judge's finding that L. M. Ericsson Telecommunications, Inc., rather than Allran Electric Corp., possessed the right to control the assignment of Ericsson's telephone switch installation work at the Kings Highway Hospital Center. It contends that the June 6, 1980, revised agreement between Ericsson and Allran transferred such control to Allran and therefore its economic activity against Allran was lawful as primary rather than secondary activity. We find no merit in this exception. The June 6 agreement does not specifically state that Allran would perform the switch installation work. In addition, we note that Ericsson had a firm policy of doing its own switch installations. Finally, the record is clear, as the Administrative Law Judge found, that Respondent, at the time of the events herein, did not view the June 6 agreement as giving Allran such authority.

vision, herein called Ericsson, against Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO, herein called Local 3 or Respondent. The complaint, which was issued on July 16, 1980, alleges that Local 3 violated Section 8(b)(4)(i) and (ii)(B) of the Act by inducing and encouraging its members employed by Allran Electric Corp., herein called Allran, to cease work on the installation of a telephone switching system at Kings Highway Hospital Center, Inc., herein called the Hospital, a health care institution located in Brooklyn, New York, under a subcontract with Ericsson, the general contractor for its installation, and by restraining and coercing Allran in violation of the Act, an object being to force and require Allran and other persons to cease doing business with Ericsson and the Hospital. Local 3 filed an answer denying the commission of any unfair labor practices.

The case was heard before me in Brooklyn and New York, New York, on August 4, 5, 6, 28, 29, September 3 and 4, and December 23, 1980. The General Counsel, Respondent, and the Charging Party have each filed helpful briefs.

Upon the entire record in this case, and my observation of the witnesses' demeanor, and after careful consideration of the briefs, I make the following:

FINDINGS OF FACT

I. THE BUSINESSES OF THE EMPLOYERS

Ericsson, a New York corporation with its principal office and place of business in the Borough of Manhattan, city and State of New York, is engaged in the business of installing and servicing telephone interconnect equipment and related products throughout the New York City metropolitan area. During the past year, Ericsson purchased and caused to be transported to its place of business goods and materials valued in excess of $50,000 directly from States other than New York and in foreign commerce directly from foreign countries. During the same period, Allran, which is engaged in business as an electrical contractor in all phases of electrical work in the city of New York, with its principal place of business located in Flushing, Queens, New York, purchased goods and materials valued in excess of $100,000 directly from firms located outside the State of New York and purchased goods and materials valued in excess of $300,000 directly from firms located within the State of New York, of which materials valued in excess of $50,000 were purchased and shipped to its place of business from suppliers who purchased and received said materials in interstate commerce directly from States other than New York. During the same period, Allran also performed services in New York State of a value in excess of $50,000 for Ericsson.

Also during the same period, the Hospital derived gross revenue in excess of $250,000, and purchased and caused to be transported to its place of business goods and supplies valued in excess of $50,000 directly from States other than New York. Upon the basis of these facts, some of which were stipulated, I find, and Respondent admits, that Ericsson, Allran, and the Hospital and each of them are and have been at all times material herein persons and employers engaged in commerce or in an industry affecting commerce within the meaning of Sections 2(1), (2), (6), and (7) and 8(b)(4) of the Act.

II. THE LABOR ORGANIZATIONS INVOLVED

Respondent, Local 3, the recognized collective-bargaining representative for electricians employed by Allran, and Communications Workers of America, AFL-CIO, herein called CWA, the recognized collective-bargaining representative for various employees of Ericsson, are labor organizations within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *Background and Work in Dispute*

Ericsson is the New York sales and installation division of the wholly owned United States subsidiary of a Swedish corporation, L. M. Ericsson Telecommunications, which manufactures and installs private telephone switching systems on a worldwide basis. Ericsson employs engineers, technicians, and other employees who work out of its New York division. Ericsson employees engaged in the installation, maintenance, and repair of interconnect telephone equipment are represented for the purposes of collective bargaining by CWA and its Local 1109. At the time of the hearing, the most recent collective-bargaining agreement covering these employees was effective from December 31, 1979, to midnight December 31, 1980.

Ericsson competes in the greater New York metropolitan area with other companies who sell to, and install and service private telephone systems for, various commercial users and institutions. The use of private telephone systems had their origin in the *Carterfone* decision[1] issued by the Federal Communications Commission in 1969. That decision allowed private individuals or firms to purchase their own telephone equipment and have it "interconnected" with an operating telephone system. Prior to 1969, operating telephone companies had refused to permit private telephone systems to be connected to the operating company's trunklines.[2]

On March 6, 1980,[3] Ericsson and the Hospital entered into an agreement under which Ericsson agreed to install a private telephone system at the Hospital's Brooklyn facility. Under a modification of that agreement made on May 24, 1980, an Ericsson manufactured electronic switch was substituted for one of its electrical-mechanical switches, the cash purchase price was substantially increased from $196,400 to $232,500 and Ericsson agreed to complete the major portion of the installation by June 18, 1980, although the parties retained May 31 as the cut over date on which the equipment was to be installed and operational to coincide with the opening of a new wing. Because of concern expressed by the Hospital, in one of the amendments to the original agreement, Erics-

[1] 13 FCC 2d 420.

[2] See *Local 134, Electrical Workers*, 191 NLRB 828 (1971).

[3] All dates are in 1980 unless otherwise indicated.

son agreed that it would employ a subcontractor belonging to Local 3 and no union conflict will arise.

The new switch, model ASB-900, described by Ericsson as a stored program control PABX, is a highly sophisticated solid state device that has no moving parts in contrast with electrical-mechanical switches, including Ericsson's own model ARD 562 which was replaced in the hospital contract. After its erection, the electronic switch is programed through the use of a processor before it may become operational, replacing the use of cables for such purpose. While previously Ericsson had utilized independent distributors for sale, installation and servicing of its own telephone interconnect systems which utilized electromechanical[4] switches, with the advent of the electronic switches, such as ASB-900 (and the ASB-100, a smaller version), Ericsson adopted the strict policy and corporate practice that only a wholly owned Ericsson subsidiary may be sold an Ericsson electronic switch and, further, that only Ericsson's own employees or employees of a wholly owned subsidiary, trained by it, may install such a switch.[5]

For the hospital job, Ericsson orally subcontracted part of the work to Allran, a company to which it had subcontracted other work in the recent past. The subcontract with Allran provided that for a base contract price of $49,156 Allran was to complete the station work, including pulling of telephone cable from a terminal block area to a main distribution frame, installing and connecting cables to the various station telephones, and the installation and wiring of key equipment and system. In accordance with its corporate policy, Ericsson retained for itself the work of installing and maintaining the switch. The latter work was to be performed by Ericsson's own employees represented by CWA and its Local 1109. The subcontract, for which Allran had bid, was awarded to it in March, although work was not scheduled to commence until May.

Since 1977, Allran's employees had been members of and represented by Local 3. In that year Allran became a signatory to and adopted an industrywide agreement by and between the New York Electrical Contractors Association, Inc., the Empire Electrical Contractors Association, Inc., and the Association of Electrical Contractors, Inc., on the one hand, and Local 3 on the other, effective July 1, 1977, to June 11, 1980.[6] Under the terms of that agreement, Allran became obligated to make weekly contributions consisting of various percentages of its weekly payroll to the Joint Industry Board, herein called Joint Board, established by the various employer associations and Local 3 many years ago early in their collective-bargaining relationship to administer the various employee benefit plans. Article II of the Industry agreement provides that the Joint Board shall consist of 15 persons representing the Union and 15 persons representing the employers and 1 person representing the public. In addition to administering the various employee welfare plans, section 9, article II, provides that the Joint Board shall administer the Employment Plan of the Electrical Industry, herein called the Employment Plan, among other plans. While not required by the terms of the agreement, it had been Allran's consistent practice, reinforced by its understanding of the proper procedure obtained from representatives of Local 3 when it initially entered its relationship with the Union, that all necessary employees, various grades of electricians and apprentices alike, would be obtained through the Employment Department of the Joint Board, herein called the Department, which administers the Employment Plan.[7]

Certain factors have traditionally played a part in determining whether the department can meet the employment requirements of electrical contractors such as Allran. With respect to telephone interconnect work, there has been a chronic shortage of electricians qualified to perform such telephone work. Such individuals are known as A-telephone journeymen to distinguish them from A-journeymen, the skilled, all around electricians in the trade. Aside from a list of any out-of-work A-telephone journeymen maintained by the department for the use of its clerks who receive and respond to telephone requests for employees, its director is aware of the identity of a number of A-journeymen electricians also qualified to perform some, if not all, telephone interconnect work.

The delinquency of employers in making contributions to the various funds administered by the Joint Board also has an effect on the department's referral of employees to them. The payroll week in the industry ends on a Wednesday. Employer parties to the industrywide agreement receive a computer printout prepared as of Thursday morning showing the contributions due on behalf of its named covered employees employed during the week just ended which are required to be paid to the Joint Board no later than the following Tuesday. Once such an employer has become delinquent in payment of any part of the contributions due to any funds for a 3-week period, including the grace period described, under the rules of the department, no referral of employees requested by that employer may be made. If such delinquencies continue thereafter, the employer plan requires that covered employees be withdrawn from the employer's work force at a periodic rate of 10 percent. From time to time, prior to May, Allran's delinquencies in making contributions to the various funds had exceeded

[4] Hereinafter used interchangeable with the term electrical-mechanical.

[5] The adoption of that policy was based on concerns of safety, retention of the Company's reputation for quality products which could be properly and efficiently maintained, and avoidance of liability under the rules and regulations of the Federal Communications Commission which had promulgated requirements and standards regarding the connection of terminal equipment to the USA telephone network. See FCC Rules and Regulations Part 68 (G.C. Exh. 32), in particular Secs. 68.215(b),(c), and (e) thereof.

[6] Sec. 2, art. VI, provided as follows:

> The subletting, assigning or transfer by an individual employer of any work in connection with electrical work to any person, firm or corporation not recognizing the IBEW or one of its local unions as the collective bargaining representative of his employees on any electrical work in the jurisdiction of this or any other local union to be performed at the site of the construction, alteration, painting, or repair of a building, structure or other work, will be deemed a material breach of this agreement.

[7] The record contains evidence that this practice is uniform within that portion of the industry maintaining collective-bargaining relations with Local 3.

3 weeks and had therefore resulted in its inability to obtain referrals of electricians through the plan. During the 6-month period prior to May, on four or five occasions, Allran had made sufficient payment of such delinquencies to at least become current under the referral rule.

With the rapid growth of the private telephone interconnect field, Local 3 and industry employers who were performing telephone interconnect work established the Telephone Interconnect Committee, herein called Committee, to deal with grievances and problems which arose between the parties in that area. None of the problems which it had considered up to May arose from complaints brought by the Union. On March 14, 1979, William Gillin, business representative for Local 3 and responsible for its employees in the telephone phase of the industry, comprising its telephone division, and Walter Whitelaw, electrical contractor, president of Whitelaw Electrical Contracting Co., Inc., the executive vice president for the past 5 to 6 years of the Association of Electrical Contractors Inc., and the presiding chairman of the Committee and its employer representatives, signed a supplemental provision, article XII, amending the then current industrywide agreement to formally cover the telephone interconnect employees. Article XII clarified and recognized existing practices concerning telephone work and practices and benefits for employees.[8] Among other things the article provided for the establishment by the Joint Board of the Committee, composed of three members of the Union and three members of the employers, to evaluate and make recommendations to the Board with respect to the interpretation of the provisions of the article. The employers agreed that all telephone interconnect employees constitute an appropriate bargaining unit and recognize the Union as sole collective-bargaining agent for said employees. The article goes on to describe the work performed by telephone employees, classifying the various categories of telephone employees including "A" telephone journeymen, and specifying various rules for interconnect telephone work. Under rule 7 the Union agreed not to strike or cause a cessation of work involving maintenance and servicing of telephone interconnect jobs or installations and the employers of telephone interconnect men involved in such activities agreed that they shall not lock out such employees.

In actual practice, the Committee has functioned as a representative body consisting of 10 representatives from the employers' side and 10 elected by employees who are employed in Local 3's telephone division and who serve for 3-year terms or for the length of a particular contract. The employee representatives are selected from among 25 members of the wage and policy (negotiating) committee of Local 3's telephone division. A subbody known as the Telephone Interconnect Review Board, herein called Review Board, was created by the Committee to deal with individual problems that are brought to the attention of the Committee from time to time. It consists of three representatives from the employers and three from Local 3's telephone division who meet periodically when individual problems are brought to its attention. None of the problems which the Board has considered to date originated with the Union, and its authority is advisory only and is exercised orally. Both Whitelaw and Gillin are permanent members and attend all meetings of both the Committee and Review Board.

Whitelaw and Gillin testified in this proceeding. Both spoke in favor of the adoption by Local 3 contractors of a total job policy or philosophy pursuant to which a Local contractor would only bid on jobs on which it could perform the total work of installing and maintaining a telephone interconnect system. Under such a policy the telephone division of Local 3 would perform the entire telephone work on the customer's property. The total job policy does not appear at any place in the industrywide collective-bargaining agreement. However, according to Whitelaw it is a concept which governs the employer-members of the Association of Electrical Contractors in bidding upon telephone system work. According to Gillin, Local 3 encourages its contractors to adopt and support the policy. Both Whitelaw and Gillin encouraged Allran's compliance with this policy in discussions each had with Steven Michaeloff, its president and chief executive, in the period preceding Allran's commencing work on its hospital subcontract from Ericsson. According to Whitelaw, some years ago when Teletronics was exclusive distributor for Ericsson in the New York metropolitan area, before the advent of the electronic switch, Whitelaw approached Teletronics to sell, install, and maintain Ericsson switches and related equipment and arrange for Whitelaw's employees to be trained in that work. His overture was rejected by Teletronics. In May, when Whitelaw learned that Allran had bid on Ericsson telephone work, Whitelaw advised Michaeloff that, as an electrical contractor taking the job, it is in the best interest for the businessman to take a total job and not part of the job. Whitelaw explained the concept as a philosophy promoted by the contractors and himself, collectively, so as to avoid the unfair competition of being underbid by Ericsson or other competitors in the field who perform the work with employees who do not enjoy the wage rates or other benefits required to be paid them by Local 3 contractors. Similarly, in or about February, Gillin called Michaeloff to inquire if he were going into telephone interconnect work. When Michaeloff said he very much wanted to, Gillin gave Michaeloff the Union's rules as to what had to be followed to do that work. The specifics would be a total installation where Michaeloff would do everything from pulling the cables to installing the equipment, to cutting and cross cutting, to putting out the phones, to labeling telephones, to handling the switches, and to handling the maintenance contract. Michaeloff took notes of these items. As Michaeloff explained it, "At that occasion I was just told I need to take the whole job or I don't take the job at all."[9] While Gillin did not recall this precise conversation

[8] Art. XII had been in effect since 1976. It was continued under a renewal agreement reached approximately 2 weeks after expiration of the old industrywide agreement on June 11, 1980.

[9] Michaeloff denied that Gillin ever conditioned referral of manpower to his firm on his obtaining the total job.

with Michaeloff, he did recall having a conversation with Michaeloff on several occasions prior to Michaeloff's working on the hospital job and also confirmed that it was Local 3 policy that the contractors in a collective-bargaining relationship with the Union seek to install the complete and entire telephone system including installation of the switch. I credit Michaeloff's recollection of this conversation.

Local 3's bylaws, article XIII, section 12, provide:

> No member is to give away work coming under the jurisdiction of this Local, or to allow any other tradesmen to do work coming under this Local's jurisdiction.

The International's constitution, which binds the Local, prohibits locals from causing or allowing a work stoppage in any controversy of a general nature before obtaining the consent of the International's president (art. XVII, sec. 13) and characterizes as misconduct for which members may be penalized the causing of a stoppage of work because of any alleged grievance or dispute without having the consent of the Local or its proper officers (art. XXVII, sec. 1).

Article IX of Local 3's bylaws also provides, in relevant part, as follows:

> Section 1. Stewards shall be appointed (where needed) by the Business Manager. They shall work under his direction and be subject under his authority. He can remove any steward as such, at anytime.
>
> Section 2. Duties of Stewards shall be:
>
> (a) To have a copy of the I.B.E.W. Constitution, these bylaws, and the working agreement and rules with them at all times.
>
> (b) To see that Union membership is encouraged, and all workmen at their respective shops or jobs have paid-up dues receipts or valid working cards of the Local Union.
>
> (c) To report any encroachment upon the jurisdiction of this Local Union.
>
> (d) To report to the Business Manager any violation of our laws, agreements or rules.
>
> (e) To perform such other duties as may be assigned to them by the Business Manager.
>
> Section 3. Stewards shall in no case cause a stoppage of work. In case of any trouble on a job or at a shop, Stewards shall immediately notify the Business Manager.

B. *Local 3's Conduct Alleged To Be Unlawful*

On Tuesday, May 27, Michaeloff assigned one A journeyman electrician, Joe Spevack, a Local 3 member, to start work on the hospital site. Work continued on May 28, when three additional electricians were assigned, including Mitchell Dworkin, a Local 3 member, who being experienced was designated as foreman to lay out the job. Four men continued at the Hospital on May 29 and 30. On Monday, June 2, Dworkin was reassigned to complete another job at Saks in Manhattan before returning to the hospital site, but three men, including Spevack, continued at the hospital on that day and the next.

On Tuesday, June 3, Allran was also doing another telephone installation job under a subcontract for Ericsson for a customer, Securities Investors Association (S.I.A.), located at 20 Broad Street in the Borough of Manhattan, New York City.[10] Two workers, Dennis Biancanello, an A journeyman, and Pat Kelly, an apprentice, both Local 3 members, were on that job with Biancanello running the job, laying out the work as senior man for Allran. Biancanello testified,[11] without contra-

[10] On May 22, upon payment by Allran of 3 weeks' deliquencies, four electricians were referred for work to Allran from the Employment Department. On that date, Allran's fund deliquencies had been sufficiently reduced to permit clearance for referral and the employment office job order so notes. However, by the last day of that week, May 28, when Michaeloff placed a job order for one or two A journeymen electricians with telephone experience to report to his shop for the 20 Broad Street job, that request was denied. Michaeloff testified under cross-examination that he was told there were none available and, in fact, that telephone workers were not available whenever he called. But Michaeloff also testified previously that at the end of May he called the employment office for A telephone journeymen for the 20 Broad Street S.I.A. job—probably the same May 28 call—and was told he would have to speak to Bill Gillin. After arranging an appointment, Michaeloff went to Gillin's office the next day but Gillin never arrived and the meeting did not take place. The Employment Department record of Allran's job order for May 28 notes in the upper right-hand corner in accordance with the practice previously described that the company is delinquent (an initial entry of "Delq" had been crossed out but replaced with another "Delq") and, accordingly, could not then be referred employees until contributions were paid reducing the delinquency below 3 weeks. Other records introduced into evidence confirm the extent of Allran's delinquency on May 28. A separate record maintained by the department shows no unemployed A journeyman and unfulfilled telephone orders for six A journeymen and three H journeymen (less qualified telephone employees) with telephone experience on May 28.

[11] I originally received in evidence, on August 5, over Respondent's objection, a transcript of Biancanello's testimony given in a related proceeding during the week of July 7 before Judge Charles P. Sifton of the United States District Court for the Eastern District of New York. The General Counsel's offer relied on Fed. R. Evid. 804(b)(1), permitting receipt of prior testimony as an exception to the hearsay rule where the declarant is unavailable. Subsequently, after the original close of the record, I reviewed and reconsidered this ruling, concluding that Biancanello's unavailability under that rule had not been sufficiently established, and in an order dated December 9, 1980, vacated my ruling, and reopened and rescheduled hearing for December 23, 1980. On that occasion, Biancanello appeared and was examined by all counsel. As a result, I reversed my ruling and now rejected Biancanello's prior testimony given in U.S. District Court, retaining it as a rejected exhibit at the General Counsel's request, and the record was closed. The facts herein discussed and conclusions ultimately drawn related thereto are based solely on Biancanello's testimony in the hearing held on December 23. Respondent's argument, disputing my authority to reopen the hearing *sua sponte* to receive Biancanello's testimony, is rejected. My authority to order hearings reopened is derived from Sec. 102.35(h) of the Board's Rules and Regulations, Series 8, as amended, and is based on the Board's own authority to take further testimony set forth in Sec. 10(c) of the Act. The reopening was timely, before issuance of my Decision, no party was prejudiced thereby, and the interests of justice were served. Since under Rule 59(d) of the Rules of Civil Procedure of the U.S. District Courts, the court, on its own initiative, may order a new trial within 10 days after entry of judgment, *a fortiori*, the trial judge has power to reopen a record prior to entry of judgment. See Sec. 10(b) of the Act and *N.L.R.B.* v. *Jacob E. Decker and Sons*, 569 F.2d 357, 362 (5th Cir. 1978), applying the FRCP to Board hearings. See also Rule 60, FRCP, and *Caracci* v. *Brothers Intl. Sewing Machine Corp. of L. A.*, 222 F.Supp. 769 (D.C. La. 1963). Reconsideration to correct errors of both procedure and substance is well recognized, *Bookman* v. *U.S.*, 453 F.2d 1263, 1265 (Ct. of Claims, 1972); *Confederated Tribes of Warm Springs Reservation* v. *U.S.*, 177 Ct. Cl. 184, 190–191 (1966); see, generally, 2 Davis, Administrative

Continued

diction, to what happened on the job that day and at the Allran shop the next morning. When Biancanello and Kelly reported to the 20 Broad Street site on June 3 Ericsson employees were observed working there. Biancanello knew they were not Local 3 members. They had previously informed him they were members of CWA. Biancanello believed the Ericsson employees were doing his work.[12] He described how the Ericsson technicians on previous days had locked themselves in the switch room, attached cables from the switch to the main distribution frame, installed boards (apparently referring to printed circuit cards installed in magazines) on which he worked, and accused him of causing a malfunction to the switch, in spite of and after Michaeloff had told him that Allran had the entire SIA job from Ericsson. On this date, June 3, Biancanello decided to leave the job, he could not continue. Ericsson's continued presence on the site showed Biancanello that Michaeloff's claim of having the entire job was false and there were problems with the men there doing his work and animosity because of his superior wages. Apparently Kelly agreed when Biancanello informed him that he was going to ask to be transferred and why.

Biancanello telephoned his request into the Allran shop after work and reported there early the next morning, June 4. At that time Biancanello asked Michaeloff what was happening, why were Ericsson employees working after he had sworn he had the entire job. Michaeloff said he was on the job to make money, and asked Biancanello why he could not close his eyes. Biancanello remained firm and along with his apprentice was transferred that day to an Allran job at 120 Wall Street (on the way he picked up Kelly at the SIA site) where he continued through June 5 and 6. On Monday, June 9, Biancanello was reassigned to Orbach's job at another location where he continued through June 11. Neither the 120 Wall Street nor the Orbach's job involved Ericsson as the prime contractor.

On the evening of June 3, in addition to learning of Biancanello's telephone call requesting a transfer, Michaeloff also learned of other employees' unhappiness over working on Ericsson jobs. Dworkin and Spevack approached Michaeloff in the Allran shop at or about 6:20 p.m. Dworkin did most of the talking. Dworkin informed Michaeloff that Spevack had spoken to Jimmy Papendreou, a Local 3 business representative for employees in upper Manhattan, and that there was a problem that had to be resolved and they could not work on the Kings Highway Hospital job. Spevack, Papendreous' cousin, confirmed that he could not work the job.[13]

Ericsson's project coordinator for the hospital job, Joe Gilmore, who was at the Allran shop that evening and heard this conversation, told Michaeloff that he had to go up to the Union to get this resolved. Both are located near each other in Flushing, Queens, New York. Within a few minutes, by approximately 6:30 p.m., on June 3, Michaeloff, Gilmore, and Michael Greenfield, Allran's vice president and general manager, were outside the Local 3 offices on the third floor of the building located on Jewel Avenue. As they got out of the elevator on the third floor outside the Local 3 offices, Michaeloff saw Bernie Rosenberg, a Local 3 representative who covers lower Manhattan, as well as Lee Schrager, recording secretary for the Association of Electrical Contractors, and spoke briefly with them. Michaeloff explained that they had a problem on the King's Highway Hospital job in Brooklyn. Rosenberg said, "[Y]ou have to speak to Gillin." According to Michaeloff, Rosenberg motioned for someone to buzz to release the lock. This was done and he and the others gained access through a locked door into the general office where Gillin's desk, among others, was located, pointed out Gillin's desk, and then left. According to Gillin, he heard a commotion outside his office area and learned that Michaeloff was at the receptionist's window in the outer office along with someone from Ericsson but his view of the window was blocked by a closet and he did not talk directly with Michaeloff that evening. As testified to by Michaeloff, they approached Gillin, he introduced himself, and said there was a problem at the King's Highway Hospital job, "my men just told me that they cannot work there, and I wanted to find out what the problem was." At that point Gillin responded, "I did not have an appointment, I have to call for an appointment and he was leaving for the evening, he had put in a long day and he would not talk to me." Michaeloff added that Gillin was angry, he spoke harshly and in a very loud voice. Gillin also told Michaeloff to contact Walter Whitelaw. Michaeloff also testified that he heard Gillin tell Greenfield that he should not be doing work for Ericsson.

While Gillin denied speaking directly to Michaeloff on the evening of June 3, he did confirm that he informed an intermediary that he would not talk to Michaeloff, who, he understood, was waiting to see him at the receptionist's window. Gillin also testified that he was aware Michaeloff had someone with him from Ericsson. Gillin also acknowledged that he informed Michaeloff through the intermediary to take his problem to the Committee.

There appears to be little material conflict between the versions of their June 3 contact offered by Michaeloff and Gillin. Gillin learned Michaeloff and someone from Ericsson was there to see him and learned the nature of the problem. He refused to discuss the matter with Michaeloff and, instead, referred him to Whitelaw and the Telephone Interconnect Committee. To the extent their versions differ, I credit Michaeloff. In particular, I credit his attribution to Gillin of the remark critical of Allran

Law Treatise Sec. 18.09 (1958). Reopening of hearings before Decision, in the sound discretion of the administrative law judge, has generally been upheld, *International Brotherhood of Electrical Workers, Local 648 [Foothill Electrical Corp.]* v. *N.L.R.B.*, 440 F.2d 1184, 1185 (6th Cir. 1971).

[12] Contrary to Respondent counsel's contention made during oral argument, I conclude that in using the phrase "my" work Biancanello had reference to telephone work, including installation of the switch, which he believed was exclusively within Local 3's jurisdiction, and he was not referring to work he personally coveted. His later testimony and his total conduct clarified that this was his meaning, particularly since Biancanello had admitted he had very limited telephone system installation experience, could not do such work alone, and did not know how to troubleshoot or install the switch.

[13] Michaeloff testified to this conversation. Neither employee was called to contradict.

working for Ericsson in a comment made to Greenfield. While both witnesses left something to be desired by way of credibility and, on occasions, contradicted themselves[14] and were shown their prior testimony before Judge Sifton in the related Federal court proceeding in order to refresh their recollections, I conclude that Gillin was far more evasive and contradictory in his total testimony and that his general demeanor reflected a reluctance and unwillingness to acknowledge facts regarding his knowledge of events, including his meeting with Michaeloff that evening, which leads me to discredit his testimony where it conflicts with that of Michaeloff and, later, Biancanello, on their exchange during a telephone conversation on June 12.

Upon Gillin's mention of Whitelaw and the Committee on June 3, Michaeloff immediately understood what Gillin wanted since he knew Whitelaw and his role in handling the Telephone Interconnect division of the industry.

At that time Michaeloff made a decision not to send any men back to the hospital site until he could find from the Telephone Interconnect Board what the problem was and if it could be resolved. As he explained, he did not want any problems. All men he had planned to send to the hospital, including Dworkin, Spevack, and Biancanello, were reassigned to other jobs.

The following day, June 4, Michaeloff telephoned Whitelaw in his office and told him what had happened concerning the hospital job, that his men did not want to work on that job and it was not being done, and asked for a meeting of the Interconnect grievance committee. Whitelaw agreed to set up a meeting of the Review Board as soon as possible and said he would get back to Michaeloff about it. Whitelaw also asked Michaeloff certain questions regarding the scope of his work on the hospital job. He asked whether Allran had the installation cables, the moves and changes,[15] the switch installation, and the maintenance of the installation. Michaeloff responded he only had the cables. Whitelaw advised that if he obtained the full scope of work the contractor's retention of supervision was satisfactory, as this arrangement had been worked out between a number of other contractors and manufacturers. Whitelaw repeated his earlier advice of some months prior to Michaeloff that it was not in the best interest of the industry that Allran do work for a manufacturer such as Ericsson who could be taking work away from Local 3 contractors, but if he insisted he could come before the Review Board.

Michaeloff then telephoned Richard Correia, Ericsson's operations manager, and informed him that certain changes had to be made in their basic agreement to include certain things that the Union required, that it had to get the switch work at the Hospital but that Ericsson could have people there on a supervisory basis to oversee the work. He also had to have a maintenance agreement. He also explained the events of the evening of June 3 at the union hall and the substance of his conversation with Whitelaw. Correia said that he had to speak to his boss, Don Costello, and would get back to Michaeloff. On June 5 or 6, Michaeloff went to Correia's office and they both spoke to Whitelaw by telephone. Whitelaw told Michaeloff the earliest time a meeting could be held was June 11, the same day the industrywide collective-bargaining agreement terminated. After speaking to Whitelaw, Michaeloff put Correia on the phone.[16] They each introduced themselves and renewed their past acquaintance. Whitelaw then said he would try to help Steve (Michaeloff) by calling the hall and he was going to talk with Gillin. He would call back as soon as he had obtained any information. About 30 to 45 minutes later, Whitelaw called back. He told Correia he could not help Steve. He said that all of Nippon Electric Corporations equipment in New York City were to be installed by Local 3. Correia asked, "Are you referring to Telcom, the distributor," and he said yes, Telcom installs all of NEC's equipment in the city insofar as switches are concerned. Correia disagreed, noting he knew there was another company located on Long Island which installs NEC's switches because he worked for them for 6 months. When Correia referred to the fact that Ericsson's employees were represented by CWA, Whitelaw said he knew that they wanted to install the systems; that they would have to install the entire system and to have the right to organize the persons that were installing the switches. When Correia asked who "they" were, Whitelaw said it was Local 3 and they wanted all the work in New York City. Correia replied that it seemed to be that he would be violating his contract with CWA because that would stop him from growing as far as CWA was concerned. Whitelaw responded, "[I]f you want to install systems with CWA, without inhibiting you in anyway, you can do that. But, if you are to use Local 3 personnel, that we would have to install the whole job." Correia replied he could not do that, he did not have the authority at the time to even talk about installing the switch because it is a policy of the Company that the switch not be installed by anyone other than its own engineering personnel.[17]

[14] Michaeloff's recollection of events was particularly garbled and inaccurate, primarily regarding the chronology of conversations with his employees as to their unwillingness to perform work under Allran's contract with Ericsson and at sites where Ericsson's technicians were employed, including the hospital site. The facts herein have been pulled from a record replete with changes, later retractions, and belated recollections and inconsistencies. However, those which may be attributed to Michaeloff primarily reflect an imprecise mind, a helter-skelter approach to facts and, in part, a desire to minimize the financial problems besetting his company, Allran, on those occasions that its series of continuous delinquencies in contributions to Joint Board funds kept it on the brink, or resulted in actual invocation of, the policy of nonreferral or withdrawal of workers.

[15] Moving telephone equipment on any changes in their location.

[16] Correia's testimony regarding this conversation was received in evidence over Respondent counsel's objection, subject to proof independent of that supplied by the alleged agent, Whitelaw himself (see Spencer A. Gard, Jones, *Evidence*, §13:26 (6th ed. 1972)), that Whitelaw, as chairman of the Telephone Interconnect Committee and Board of the Joint Industry Board, was an agent of Local 3, thereby binding Local 3 to any admissions against its interest made during the course of the conversation. My conclusions regarding the independent establishment of Whitelaw's agency status are set forth, *supra*, in the analysis portion of this Decision. Accordingly, I have determined to receive this testimony in evidence.

[17] I credit Correia on the substance of these two telephone conversations with Whitelaw, as against Whitelaw who was not examined on any telephone conversation with Correia after talking with Michaeloff on June 5 or 6, but who denied, generally, any discussion with Local 3 rep-

Continued

Following these conversations, and Correia's discussion with Costello, a written agreement between Ericsson and Allran was prepared revising the existing oral understanding between them. It provided, *inter alia*, in paragraph 3 that "[Allran] will accept responsibility for all telephone cables terminating within the switch room. Our responsibility will also include the assembly of the customers telephone equipment." Paragraph 8 embodied a service agreement providing that Allran will service the Ericsson system at the Hospital for a period of 1 year from completion on a 24-hour-a-day basis, 7 days a week. The agreement also had attached an activities list specifying the work to be performed and also provided in paragraph 7 that the work would be completed by the critical cut date of June 18.[18] This agreement, prepared on Allran's letterhead, was signed by Correia for Ericsson and Michaeloff for Allran on June 6.

On June 6, Michaeloff again spoke with Whitelaw and told him about the terms of the revised agreement with Ericsson. Whitelaw told Michaeloff it sounded like it was in compliance and to bring a copy to the meeting and have it reviewed.

Based on these exchanges with Gillin and Whitelaw, it was Michaeloff's understanding that the Review Board had the authority and that the meeting would resolve the problem of whether his men could or could not work at King's Highway Hospital, that he would learn how the Union and the contractors felt about this specific job.

As noted, Allran performed no work at the hospital site pending the result of the scheduled June 11 meeting. On June 11, Correia and Michaeloff went to the building in Flushing which houses Local 3 and the Joint Board, its various funds and subdivisions. The meeting took place in a conference room on the third floor since the Joint Board chairman's room was occupied. Whitelaw informed Correia no representative of Ericsson could be present and he waited outside. Michaeloff attended along with three employer and three union representatives. The employer representatives were Whitelaw, as chairman of both the Joint Board and the employer delegation, and two employers who compete with Ericsson for installation of private telephone systems, Charles Lagana, of Standard Telephone Communications and Tim Renny of Northern Telecom Systems. Local 3 was represented by Gillin, and two A telephone journeymen, Lew Bertos and Wayne Foote. Joe Sidel, a third journeyman, was in attendance unofficially as an alternate and did not participate.

The portion of the meeting concerned with Allran lasted 1-1/2 hours and was followed by continued negotiations on renewal of the expiring industrywide collective agreement. The main spokesmen were Whitelaw and Gillin.[19] Michaeloff was asked to introduce himself and state his reasons for doing work for Ericsson. Gillin asked if Michaeloff knew about Ericsson's relationship with Teltronics, the company which, until it went out of business, had been Ericsson's American distributor of its electromechanical telephone switching systems, and with other contractors. Michaeloff said he did not. Michaeloff explained that he had been working for Ericsson for about 6 or 7 months, that he found them to be a firm that paid their bills, that they were honorable, and that he wanted to continue working for them. Michaeloff then said he realized at that point he did not comply with the maintenance agreement, the switch and change agreement, and the total job entity that they were looking for. He had gone back to Ericsson and gotten it. He then produced the June 6 agreement and read it to the Review Board. Various questions arose as to the specifics of the scope of work such as the cut down and crossovers and Michaeloff referred to the activities list attached to the agreement. Gillin continued to raise in a critical way Ericsson having worked with companies other than Local 3 contractors, other unions, and the history of its exclusive relationship with Teltronics. According to Michaeloff, Gillin also told him he had to have only total jobs. When Michaeloff indicated he had the total job, Gillin did not discuss it further with him.[20]

Renny of Telecom then said that Ericsson gave work out to many other people, that he himself took over approximately 200 maintenance agreements when Teltronics broke up, and that the only way he would work with Ericsson was by "locking him up," meaning doing all of his telephone work under a firm contract or not doing it at all. Michaeloff replied that he did not look at Ericsson as a competitor, but as a source of work. He said that the contractors present were his competitors but Ericsson was his supplier of contracts and work. Lagana of Standard then asked if it were possible to get Ericsson to commit all its work to Local 3. When Michaeloff responded that he, Lagana, would have to take that up with Ericsson, Whitelaw said he would speak to Correia later.

At this point, it was indicated that the matter would be taken up in caucus and Michaeloff was asked to leave the room. Before he did so, Michaeloff asked for a specific answer immediately so he could inform his client whether he was going back to work or not.

When Michaeloff presented the new agreement he had with Ericsson, Whitelaw was skeptical. He had never seen a major firm give a contract drawn by a sub, as in this case. Whitelaw also raised questions concerning the

resentatives between June 4 and the June 11 Review Board meeting. Whitelaw's demeanor and the sum and substance of the concerns he expressed, paralleling those of the Union, that Local 3 contractors not bid on or perform any telephone work less than a total job, convince me that he sought to obtain some assistance for Michaeloff who appeared to be amenable to guidance regarding the joint union, employer association total job concept.

[18] According to Michaeloff, Allran was fully prepared to complete work under his contract by June 18, with its own employees. He normally did not want to handle the switch installation unless it was absolutely necessary. His men were not sufficiently trained for such sophisticated equipment and he did not want to take the chance of a lawsuit arising from an improper or unsafe installation.

[19] Three witnesses, Michaeloff, Whitelaw, and Gillin, testified about the meeting. Where conflicts appear, I will resolve them as they arise.

[20] Gillin denied having objected at any time at the meeting to Michaeloff continuing work for Ericsson and acknowledged that there was nothing in the collective-bargaining agreement to prevent him from doing so. At the same time, Gillin testified that while Michaeloff said he had a total job at the hospital site, he did not show proof of it to Gillin. In view of the interest shown by Gillin at the meeting in Michaeloff's claim of a total job and Gillin's concern for the total job concept as applied to Allran on June 11 and on other occasions as well as my evaluation of his credibility previously noted, I credit Michaeloff on attributing these statements to Gillin.

agreement; in particular, that it did not contain any penalty in case of breach. When Michaeloff explained the problems he was having in getting the job done, Whitelaw got angry. As Whitelaw explained, Michaeloff appeared to be hearing for the first time his philosophy that to take partial work is not a good philosophy. In Whitelaw's opinion, the June 6 agreement was not binding.

After Michaeloff left the room, Whitelaw related that the contractors were adamant because some of them had figured this very job and had lost it. Neither did they have the opportunity to give out parts of the job as Ericsson was doing.[21] The employers also discussed that, in order to maintain their system, there was no way that Allran was qualified to hold this agreement because he had never done a system like this nor did he have people on his payroll who could maintain it. As Whitelaw described it, a consensus of the employers present was reached that: (1) they would encourage Michaeloff to get the total work from Ericsson and the Local 3 employers would seek to arrange to negotiate more work with Ericsson on the basis of competitive bid, with Allran, although too small and not expert enough to do the work alone, to be part of this group; and (2) inform Michaeloff that legally, within the agreement, he could go out and take anything he wants to and go out and do it. The union position, as expressed by Gillin, was that it did not object to the employers' position if not arbitrary under the agreement, and it agreed that nobody would stop Michaeloff or give him a hard time if he continued to do what he wanted with Ericsson. It was also the consensus of the Review Board that the revised Ericsson-Allran contract did not comply with the total job philosophy.

When Whitelaw emerged, he asked Michaeloff how he could live up to this agreement because he did not have the ability to do it and he would have to subcontract work out to IBEW people and his contract did not allow it. Whitelaw encouraged Michaeloff to get the total job. When Michaeloff asked if he could go back to work at the Hospital, Whitelaw said he could, that he was legally within the agreement in taking anything he wants and do it. He should send people over and have them work. If someone does not want to do a job, send somebody else. Whitelaw acknowledged that he knew that certain local members had refused to work on the hospital job. Whitelaw also advised Michaeloff to arrange a meeting between Local 3 contractors and someone from Ericsson in a decisionmaking capacity looking toward Ericsson's work being performed by such contractors. Whitelaw declined at the time and put off to the following week a planned talk with Correia who was waiting, Whitelaw having already learned from Correia that he had no authority to change the Ericsson policy on switches and the like.[22]

Correia then contacted his office and instructed Gilmore to be at Allran's shop early in the morning, listen when the men were assigned to the Hospital and report back what he learned. Michaeloff himself contacted Gilmore and informed him that he was bringing in a journeyman and apprentice, and, if he had to, an additional journeyman would be assigned to the Hospital.

Shortly after 7 a.m. on June 12, Biancanello and Spevack, who had reported to the shop at Michaeloff's prior direction, were assigned then and there to the hospital job. Michaeloff told them he had had a meeting with the Interconnect Committee and that the decision, to his understanding, was to go back on the job. Michaeloff advised both workers whose tools had been picked up the prior afternoon by Mike Greenfield and were then in the shop, that they should go immediately to Kings Highway. He also said he was going to send down apprentices from other jobs, and, if they needed additional men, to let him know. Michaeloff also asked Gilmore, who was present, to get the key sheets (blue prints) and necessary cable back on the job.

Biancanello, whose testimony does not derogate from Michaeloff's but describes more vividly the events at the Allran shop that morning, testified he had received a call the evening before from Greenfield to report to the Allran shop on the morning of June 12. Biancanello met Spevack, Michaeloff, and Joe Gilmore there. When he arrived, Gilmore and Michaeloff were discussing another big telephone job at Rockefeller Center,[23] Northern Telecom and Brooklyn Hospital jobs.

Biancanello testified that before being assigned with Spevack to the hospital site, Michaeloff "swore on a stack of Bibles" he had the entire hospital job. Michaeloff said he was getting beepers, was going to buy Ericsson trucks, and that he, Spevack, and Dworkin would be sent to Ericsson's switch school to learn the installation of its switches. The three of them would be assigned Ericsson telephone repair work and would be on 24-hour call with beepers. According to Biancanello, Michaeloff was in an expansive and positive mood, in contrast to his hostile, angry, and agitated state on June 4, when Biancanello received his transfer from the SIA job.

Upon arriving at the site between 8:30 and 8:45 a.m., Biancanello and Spevack looked over the job and started talking, particularly about Biancanello's experience at the SIA job at 20 Broad Street. Spevack expressed ill-feeling in agreement with Biancanello. Biancanello saw that they would need at least three A telephone journeymen to complete the job as planned in a week's time. Biancanello said to Spevack, "I know a little, but more than you,[24] who's going to mount the switch, who's going to troubleshoot, who's going to do the technical installation part?" Biancanello had installed two switches but with Ericsson people pointing the finger at every move he made. Biancanello then called Gillin, the union repre-

[21] This was an apparent reference to the contractual clause (art. VI, sec. 2) binding employer signatories to sublet, assign, or transfer electrical work only to persons or firms recognizing the IBEW or one of its local unions.

[22] According to Correia, Michaeloff told him then that he was sorry but that he could not do his work. Michaeloff was not asked about this conversation with Correia but did state that his request to return was not answered by the Review Board, either orally or in writing.

[23] Michaeloff anticipated doing work for Ericsson at Rockefeller Center, Manhattan, after the hospital job, although he did not receive the job. He learned this after his relationship with Ericsson terminated on the hospital job.

[24] Biancanello assumed he was in charge of the job because he was the one employee receiving over scale and with some knowledge of telephone work.

sentative in charge of telephone work, because he wanted to walk off the job.

After speaking to his secretary, Biancanello got Gillin on the line. He identified himself and told Gillin he was at a job in Brooklyn doing telephone work. He told Gillin he was at the Kings Highway Hospital job.[25] He gave Gillin an example of the problems which had arisen on the SIA job (without identifying the site) which may happen here, "where these men work on the job, do supposedly our contract work, and then they are taking work away from me. From my brothers." Biancanello also told Gillin he did not enjoy working with people who did not enjoy his prosperity. Biancanello then asked, "If I was to walk off the job, would the union take any action against me." Gillin said, "The Union will take no action against you."[26] Biancanello also testified that Gillin neither encouraged nor forced him to remain on the job, and that, if he had been ordered to stay, he would have done so under protest.

Biancanello did not mention to Gillin that Spevack was with him on the job and listening to his call. Right after the phone call, Biancanello repeated Gillin's responses, Spevack agreed with him to leave and both packed their tools and returned to the Allran shop. Before returning, they called ahead and asked for transfers. Michaeloff had gone off to a Manhattan jobsite, but through an intermediary, who had both on the line, told them to return to the shop. During this call, Biancanello also relayed the message that he did not enjoy working with people who did not enjoy the same prosperity he did.

On their arrival they spoke with Michaeloff who had also returned. As testified to by Biancanello, he asked Michaeloff for transfers for himself and Spevack.[27] He said he did not believe Michaeloff that Allran had the entire job because of the deadline and status of the job. "Basically, I said I refused to work with people who don't enjoy the same prosperity I enjoy," referring to employees of Ericsson. Both employees were then paid off, left the shop, reported to the Joint Board Employment Department where they turned in their slips, and Biancanello, at least, was immediately referred out to another contractor by whom he has since been steadily employed.

Biancanello testified that he was familiar with the Local 3 bylaw providing that no member is to give away work coming under the jurisdiction of the Local or to allow any other tradesmen to do work coming under the local's jurisdiction (art. XIII, sec. 12) and that it was in reliance on the principle which this bylaw represents that he objected to his employer, Michaeloff, as to both the SIA and hospital jobs. Biancanello noted that he wanted to stay with Allran. He was receiving over scale. He was learning telephone work. But he felt he could not work with the Ericsson employees because they were encroaching upon the jurisdiction of Local 3. He took it upon himself to report this encroachment to his union.[28]

On June 12, Michaeloff also telephoned the employment department for two A telephone journeymen electricians for referral to the Kings Highway Hospital. He was quickly informed by the department that none was available. On June 12, the department had 13 unfulfilled requests for telephone journeymen, 8 of those being for "A men" who had been in very short supply for several years. There were 7 A journeymen electricians unemployed, 10 had registered with the department that day, and 13 were referred out to jobs the following day. On June 12 the joint board had received a payment through the mail from Allran representing fund contributions for the workweek ending May 7. With this payment Allran still owed fund contributions for the following 5 weeks through the week ending Wednesday, June 11. Pursuant to the automated posting practice previously described, Allran on June 12 was delinquent for 4 full weeks not including the week ending June 11 for which he still had a grace period to the following Monday, June 16. This made Allran ineligible to receive extra employees by referral since the firm was delinquent beyond the permitted 2-week maximum period.

Michaeloff next telephoned Correia and asked to have Gilmore sent over to settle up his account. A settlement was shortly made relieving Allran of any further obligation to perform its contract at the Hospital. Allran was paid a small balance of $1,722 remaining above the $9,156 it had requisitioned at the end of May, with the invoice evidencing this billing also reflecting the credit of $38,278 on the original contract price of $49,156 for job completion performed by L. M. Ericsson personnel. In fact, Ericsson contracted on June 16 with a non-Local 3 electrical contractor, Brookville Communications Corp. of Manhattan, to complete the portion of the job for which Allran had been retained, for a contract price of $17,950.

[25] Biancanello failed to recall whether he identified his work location, but, after being shown his prior testimony in the Federal District Court proceeding, agreed that since he had so testified in his appearance in the related proceeding on July 7 and he recalled it then, it must be true. Biancanello's present testimony thus met the standard for receipt of the statement as a past recollection recorded. Although not explicitly read into the record, it was received in summary form. See Fed. Evid. 803(5).

[26] Gillin, who also testified to this telephone conversation, denied that Biancanello had identified his worksite. He also claimed not to have known Biancanello who was not a telephone journeyman. His testimony regarding Biancanello's question and his own response was consistent with Biancanello's. Gillin also testified affirmatively to the question if Local 3 had been shown a contract establishing that Allran had obtained the total job at the Kings Highway Hospital, whether all Local 3 members, employees of Allran, would have been directed by Local 3 to remain on the job. I conclude that Biancanello did inform Gillin of the location of the job, and of his fears of working at a site where non-Local 3 members would be doing a portion of telephone system work belonging to Local 3 members.

[27] Michaeloff testified both Biancanello and Spevack asked to be laid off and the termination slips given to each of them state as the reason "Employee Requested Termination." I conclude that each asked for a transfer but that they acquiesced in the termination when informed by Michaeloff that he did not have any other work for them.

[28] While Biancanello was not so definite as to the motivation for his report to the Union, his testimony as to the events which led him to telephone Gillin from the hospital site and the substance of his conversation with Gillin warrants the conclusion that he was impelled by the same motivation in seeking union release from any sanctions for a refusal to work the hospital job.

C. *Contentions of the Parties*

The General Counsel contends that by inducing and encouraging individuals employed by Allran, a secondary employer, to engage in a strike or refusal in the course of their employment to perform services for their employer and thereby threatening, coercing, and restraining Allran, with an object of forcing or requiring Allran to cease doing business with Ericsson, Local 3 has engaged in unfair labor practices in violation of Section 8(b)(4)(i) and (ii)(B) of the Act. The General Counsel also contends that Local 3 engaged in 8(b)(4)(ii) conduct threatening, coercing, and restraining Allran with the same 8(b)(4)(B) object by withholding the referral of employees to Allran for assignment to the Kings Highway Hospital job through the agency of the employment department of the Joint Board. The General Counsel finally contends that Local 3 engaged in 8(b)(4)(ii) conduct, threatening, coercing, and restraining Allran with the same proscribed object, by inducing and encouraging Allran directly, and by its alleged agent, Whitelaw, to submit to the time-consuming and delaying procedures and processes of the Telephone Interconnect Review Board and to their pressures that Allran adhere to the total job philosophy and not continue its business relationship with Ericsson unless it obtained the total telephone system installation at the hospital site.

Respondent Local 3 disputes that the facts adduced support the charge that Local 3 either encouraged, induced, or ratified a strike of Allran's employees. Local 3 also denies that Allran sought referrals to the hospital job and that, if it did, the Joint Board employment department is its agent for the purpose of attributing to it nonreferral of employees or that Allran was denied employees for a proscribed object but rather was denied them because the A telephone journeymen sought were not available, and, in any event, Allran was precluded from referrals on the legitimate, noncoercive ground of its excessive fund contribution delinquencies. Local 3 further denies that Whitelaw or the Telephone Interconnect Committee or Review Board is its agent for purposes of attributing to it any pressures and advice to which Allran was subjected by its submission to the Review Board of the problem arising from the refusal of its employees to work at the hospital site. Local 3 further contends, assuming *arguendo*, that the General Counsel has established an 8(b)(4)(i) or (ii) form of pressure, that Local 3 did not have a cease doing business object because it was engaged solely in a primary dispute with a contractual employer, Allran, to gain adherence to the total job concept thereby preserving its traditional work of installation and maintenance of private telephone systems, including electrical, mechanical, and electronic switches used in such systems.

D. *Analysis and Conclusions*

The key to an understanding of the Union's role in this dispute lies in its espousal of the policy of the total job. Business Representative Gillin readily acknowledged that in his experience it has always been Local 3's policy that it prefers contractors who deal with it to seek to do total jobs only. That the Union sought to apply this policy to the installation of telephone interconnect systems, apart from the other areas of the electrical industry in which the Union and its membership has an interest, is evident on the record. As shown, both the interests of the Union and the electrical contractors are at stake when telephone equipment manufacturers, such as Ericsson, have opted from time to time to retain for themselves the installation and maintenance of at least a portion of their own sophisticated equipment, so as to control quality and minimize risks of damage, safety hazards, and litigation.

Gillin made clear the Union's total job policy to Allran's president, Michaeloff, months before the hospital job commenced when Allran was first breaking into the field. At the time, Gillin described the various components which comprise the total installation work in the telephone field, and, in particular, emphasized the Union's interest in Allran taking the whole job or not taking it at all. The policy as publicized by Gillin is consistent with and reinforced by article XIII, section 12, of Local 3's bylaws, which prohibits its members from giving away or allowing other tradesmen to do work coming under its jurisdiction.

On June 3, when Biancanello refused to continue at the SIA job and so informed Michaeloff, and Dworkin and Spevack informed Michaeloff that they refused to work at the hospital job after Spevack's conversation with Local 3 representative Papendreou, these Local 3 members were acting to enforce the Local 3 bylaws and the consistent Local 3 policy as to telephone work that requires Local 3 contractors to bid on and obtain all telephone systems work or not to perform it at all.[29]

Allran's complaint first voiced to Gillin on June 3 at the union offices, and thereafter to the Joint Board and its Review Board representative, Whitelaw, and on June 11 to both of them at the convened Review Board meeting proved ineffective to obtain relief for Allran from its having run afoul of the apparently otherwise universally embraced total job policy. Michaeloff's approach to Gillin did, however, serve to acquaint Gillin, if he had not already become aware, that certain Local 3 members employed by Allran would not work the hospital job under subcontract for Ericsson.

Gillin's referral to Whitelaw and the Interconnect Review Board brought about a delay in the ultimate resolution of the Ericsson-Allran business relationship. It also provided an opportunity for Allran's fellow employers and the Union to seek to educate Michaeloff still further in the intricacies of the total job concept. The Ericsson-Allran contract modifications did not relieve the widespread fears that Ericsson had indeed reserved the switch installation for itself. Those fears were probably well grounded, given Michaeloff's own readily expressed reservations about handling Ericsson's sophisticated switch.

[29] The action of the Local 3 members on June 3 and thereafter the action of Local 3 in ratifying the June 12 walkout from the hospital site must be viewed apart from and unrelated to the contractual limitation on contracting out work, inasmuch as the Local 3 employer involved, Allran was itself a subcontractor with no authority to assign or reassign the telephone work. The manufacturer and contractor Ericsson was not a Local 3 employer and thus not subject to the prohibitions of the clause.

As to the General Counsel's claim of agency status for Whitelaw, I am prepared to find that the chairperson of the Review Board, a creation of the Joint Board, itself created by Local 3 and the contracting employers during the course of their collective bargaining, is a joint agent of both Local 3 and the employers in the performance of his role in arranging for, convening, and presiding at the meetings of this deliberative body.[30]

Even apart from the creation of an agency-principal relationship between Whitelaw in his official capacities and Local 3 which may be implied from the facts regarding the establishment and functioning of the Review Board, Whitelaw was clothed with apparent authority by Gillin to deal with Michaeloff's problems during the June 3 conversation between them. Michaeloff acted reasonably in believing that Whitelaw had been authorized to act as Gillin's or Local 3's agent in handling these problems. See Restatement, Agency 2d §8 (Comment C).

I conclude, however, that whatever else it signified, the referral to the Joint Board and the June 11 meeting itself do not warrant the conclusion, as urged by the General Counsel, that Local 3, either directly or through the actions of Whitelaw and Telephone Interconnect Review Board, thereby "threatened, coerced or restrained" Allran's Michaeloff to cease doing business with Ericsson. Rather, all that the conversations held between Michaeloff and Gillin and Michaeloff and Whitelaw and the discussions held before the Joint Board on June 11 comprised were an effort to persuade and to convince Michaeloff to make a business judgment to seek to obtain a total job or not to perform the job at all. Such conduct does not amount to an inducement which would "threaten, coerce, or restrain" in violation of Section 8(b)(4) (ii),[31] and I so conclude.

While the whole transaction relating to the Review Board did not constitute the predicate for an independent violation of the Act, it did serve to highlight and reaffirm the Union's objective the following day, June 12, when Gillin received Biancanello's telephone call. As I have earlier found, contrary to Gillin's denials, by June 12 he was fully aware of the precise nature of Allran's difficulties, in particular, the refusals of the Local 3 members employed by Allran to work telephone jobs on which Ericsson's own employees were engaged because of the Union's policy, as reinforced by its bylaw. When Gillin provided Biancanello with union approval of his action in withdrawing his services at the hospital site, Local 3 was sanctioning and ratifying a work stoppage which had commenced on June 3 with Dworkin and Spevack's conduct and was now continuing with Biancanello's (in which Spevack joined after learning of Gillin's approval).

Recall that Dworkin and Spevack received Papendreou's prior approval for their actions of June 3 in announcing to Michaeloff their refusal to work at the hospital site. Even if they had acted on their own on June 3, Gillin's later authorization of Biancanello's refusal to work constitutes a ratification of their and Biancanello's prior conduct.[32] "Express authorization is not essential to bind a labor organization. The fact of agency may be inferred from all the circumstances. A labor organization is in no different position than any other legal entity when that issue is in dispute."[33]

That the employees obviously looked to the Union for authority to refuse to work or to walk out with impunity is clear since the contacts with the Local 3 representatives were made prior to the actions taken and Biancanello, in particular, stated he would have worked under protest had the Union directed him to do so.

In a previous case involving Local 3 (*International Brotherhood of Electrical Workers, Local No. 3 (Eastern States Electrical Contractors, Inc.)*, 205 NLRB 270 (1973)), the union was held responsible for inducing and encouraging a walkout in violation of Section 8(b)(4)(i) and (ii)(B) even though it made no overt demand, complaint, or request of a walkout, no picketing occurred, no threats were made, and only Local 3 workers walked off. Although it appeared that the Local 3 workers walked off due to an "individual decision of the men," the administrative law judge found, and the Board upheld, a violation on the grounds that the bylaw previously cited and discussed constituted an inducement or encouragement to the action.[34] The administrative law judge also looked to the fact that the Local took no action to discipline the men or to seek to get them to return to work as required by the Union's constitution and bylaws where unauthorized work stoppages occur.[35]

[30] See *Plumbers and Steamfitters Union Local 375, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO-CLC (Richard C. Osborn)*, 228 NLRB 1191, 1195 (1977); *United Brotherhood of Carpenters and Joiners of America, Local #1913, AFL-CIO (Michael R. Amato)*, 213 NLRB 363, fn. 1 (1974); *Local 80, Sheet Metal Workers International Association, AFL-CIO (Turner-Brooks, Inc.)*, 161 NLRB 229, 234 (1966). Just as in these cases, where the Board found an agency-principal relationship, the Joint Board and trust funds exist by virtue of a collective-bargaining agreement, the Joint Board and funds are operated and administered pursuant to the said agreement, the parties to the agreement have and exercise control over them, the function of the "chairman" or "trustee" is not separate and distinct from his function as an employer, and the union plays an important role in dictating the policies of the Joint Board and chairman of the subsidiary Review Board and the manner in which the Review Board exercises its advisory authority. Under these circumstances, the jointly established and administered Joint Board and funds are agents of each party to the collective-bargaining agreement. *Clerks and Checkers Local No. 1593, International Longshoremen's Association, AFL-CIO (Caldwell Shipping Company)*, 243 NLRB 8 (1979); *Jacobs Transfer, Inc.*, 227 NLRB 1231, 1232 (1977).

[31] See *N.L.R.B.* v. *Servette, Inc.*, 377 U.S. 46 (1964). As carefully delineated by the Supreme Court, appeals to "individuals" not to perform services are covered by Sec. 8(b)(4)(i), while appeals to "persons," i.e., those invested with managerial authority such as Michaeloff, to influence them to make a managerial decision within their authority to cease a business relationship with another employer are not violations of Sec. 8(b)(4)(i), and only violate Sec. 8(b)(4)(ii) if such appeals are coercive or threatening. *Id.*

[32] A principal (the union) may ratify the acts of the agents (the employees) by affirming the prior acts which did not bind the principal when done. Such ratification has the same effect as though the acts of the agents were originally authorized. Restatement, Agency 2d, §82.

[33] *Ivan C. McLeod, Reg. Dir.* v. *Local 25, International Brotherhood of Electrical Workers [New York Tele. Co.]*, 57 LRRM 2107, 2109 (D.C.N.Y. 1964).

[34] *IBEW Local No. 3 [Eastern States], supra* at 273. The maintenance of the bylaw was not itself a violation, but only constituted the inducement and encouragement element of the 8(b)(4) violation which occurs when the members, acting in accordance with the bylaw, cease to work for a proscribed object. *IBEW Local No. 3*, 205 NLRB at 273.

[35] *Id.* See also *International Longshoremen's Association, Local 1694 (The Board of Harbor Commissioners, Wilmington, Delaware)*, 137 NLRB 1178, 1187 (1963).

In the instant case, the facts even more strongly suggest that the refusal to work at the Hospital jobsite falls within Section 8(b)(4)(i) and (ii) of the Act. Local 3 was aware of the refusal to work, Biancanello would have worked at the jobsite if directed to do so by Local 3, and no disciplinary measures were taken against the Local 3 members who refused to work, even though, unlike the situation in *Eastern States*, the contract addendum covering telephone installation work and employees prohibits strikes and lockouts. These circumstances compel the conclusion that the walkout was not merely an independent decision of the workers, but a consistent reaction implicitly authorized by the Union which revealed a well-defined pattern clearly related to Respondent's interests.[36]

Under these circumstances, I conclude that Local 3 induced and encouraged[37] individuals to strike or refuse to perform services for Allran within the meaning of Section 8(b)(4)(i) and ratified an ongoing strike and refusal to perform services underway since June 3, within the meaning of Section 8(b)(4)(i) and (ii).[38]

The foregoing analysis regarding the agency status of the Joint Board's Telephone Interconnect Committee and the Board is equally applicable to the Joint Board's employment department. That department was likewise created jointly by agreement of the contracting employers and Local 3 to serve their mutual interests in providing a ready and qualified source of employees for employers in the electrical industry and eliminating the wasteful searching for jobs by employees. The rules and regulations governing the department's operation further the legitimate interests of the contracting parties and, in particular, the Union, in minimizing Joint fund delinquencies insofar as they limit employer users to those who are not excessively late in making fund contributions. In so operating, the department acts for the associations of employers and the Union as their joint agent. Furthermore, the Union's advice to Michaeloff on the occasion of Allran's execution of the industrywide agreement that requests for employers are to be made to the department and Michaeloff's testimony that he believed Allran was bound to seek referrals solely from the employment office satisfy the standard for creation of apparent authority in the Department to act for the Union.[39]

The Department's action in refusing to refer in furtherance of one of its principal's unlawful secondary objective, if such it be, is subject to the same standard as if the nonreferral had been determined by Local 3 itself.[40]

This conclusion as to agency status does not resolve the matter as to whether the nonreferrals of A telephone journeymen to Allran on June 12, as claimed by the General Counsel, constitute an 8(b)(4)(i) inducement of employees to engage in a strike or withholding of services. One problem is that Local 3 was not obligated by contract to make referrals of applicants for employment to Allran. At least, the contract in evidence does not so provide.[41] I conclude, however, based on Michaeloff's testimony of his understanding regarding Allran's obligations to seek employees from the department, Allran's uniform practice thereunder, and Biancanello's corroborative testimony regarding the manner of seeking employment in the industry, that there exists an "established arrangement and course of employment" affecting members of the Union which have sufficient characteristics of "certainty and continuity" to warrant the conclusion that the Local 3 members on the referral list of the department are "individuals employed" within the meaning of Section 8(b)(i) even though Allran and the members do not stand "in the proximate relation of employers and employee."[42]

Even given the foregoing preliminary conclusions, I cannot find on the record before me that the refusal of the employment department to refer A telephone journeymen to Allran on June 12 was motivated by any unlawful secondary object. The admitted very short supply of experienced telephone workers, and Allran's habitual delinquencies in making contractual payments of requisite fund contributions, which on June 12 triggered the application of the neutral rule denying referrals to excessively delinquent employers in spite of Allran's payment that day of 1 week's contributions, is convincing that the refusal to refer applicants, if any, on that date, was not coercive.[43] I will therefore recommend dismissal of the complaint allegations that Local 3 engaged in 8(b)(4)(i) or (ii)(B) conduct by its refusal to refer journeymen.

Having found that there existed inducement and coercion within the meaning of Section 8(b)(4), the issue remains whether "an object" of the inducement and coercion was to cause the cease-doing-business consequences prohibited by Section 8(b)(4)(B). The answer depends upon how Local 3's pressure is viewed. If Allran, the immediate recipient of the Union's pressure, is the employer with whom Local 3 has its dispute then Respondent's conduct is protected and any resulting effect upon Ericsson would be viewed as incidental. However, if, under

[36] *McLeod* v. *Local 25, IBEW, supra* at 2110. The Union's contention to the contrary, in particular that Biancanello acted out of a matter of his individual conscience, must, accordingly, be rejected.

[37] As noted by the Supreme Court in *International Brotherhood of Electrical Workers, Local 501 [Samuel Longer]* v. *N.L.R.B.*, 341 U.S. 694, 701 (1951), "the words 'induce or encourage' are broad enough to include in them every form of influence and persuasion." See also *N.L.R.B.* v. *Local Union No. 3, International Brotherhood of Electrical Workers [New York Telephone Co.]*, 477 F.2d 260 (2d Cir. 1973), enfg. 197 NLRB 328 (1972).

[38] The fact that only certain individuals employed by Allran were induced to engage in the strike is immaterial. It is well settled that a complete stoppage of work is not necessary to show unlawful restraint or a "cease doing business" object within the meaning of Sec. 8(b)(4)(B) of the Act. *N.L.R.B.* v. *Local 825, International Union of Operating Engineers, AFL-CIO [White Construction Co.]*, 400 U.S. 297, 304-305 (1971); *Local 3, International Brotherhood of Electrical Workers, AFL-CIO (New York Telephone Company)*, 140 NLRB 729 (1963), enfd. 325 F.2d 561 (2d Cir.).

[39] See discussion, *supra*.

[40] See cases cited at fn. 30, *supra*.

[41] As noted, reference in art. II, sec. 9, is made, *inter alia*, to an employment plan of the Electrical Industry to be administered by the Joint Industry Board, but aside from testimony regarding certain of its practices no formal rules or regulations were introduced or made part of the record.

[42] See *Local No. 636 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Detroit Edison Co.)*, 123 NLRB 225, 232-236 (1959), enfd. in relevant part 278 F.2d 858, 863-865 (D.C. Cir. 1960).

[43] I note that the General Counsel failed to marshall the evidence or argue in support of this theory of violation in its extensive post-trial brief.

all the circumstances, it is determined that Allran, the pressured employer, was a neutral and that the pressures exerted on Allran were secondary—"tactically calculated to satisfy [its] objectives elsewhere"[44]—then Local 3's conduct violates Section 8(b)(4)(B).

I am convinced, based on the evidence previously summarized, that Allran was a neutral to the dispute and that the pressures exerted on Allran were secondary and in violation of Section 8(b)(4)(B). The factors upon which I rely are the following:

The expression of the Union's concern that Allran arrange for a total telephone installation after it had already contracted for only a portion of the total hospital job shows that a union object was to secure the work which Ericsson had retained for its own employees. As Ericsson had no contractual relationship with Local 3, the only way the Union's objective could be achieved would be by replacing Ericsson employees with members of Local 3. Thus, the Union's concern was not with the labor relations of its own contracting employer, Allran, but rather with the labor relations of Ericsson and its own employees. Clearly, one of the Union's purposes has been to influence directly the conduct of an employer other than the struck employer Allran.

Over the course of the dispute, there was little direct contact between Local 3 and Ericsson. The absence of such direct confrontation is not meaningful. There need not be an actual dispute with the boycotted employer, Ericsson, for the activity designed to influence its conduct to be deemed secondary, so long as the tactical object of the Union's effort is to seek the work which Ericsson had reserved.[45] Furthermore, the fact that the Union was also generally concerned with Allran's failure to comply with the total job policy, as well as Ericsson's own labor relations policies, is not significant. So long as one of the Union's objects was secondary in nature, even though it was not the sole object of the Union's conduct, it is prohibited by Section 8(b)(4)(B).[46]

The Union argues that its sole objective was a primary one of preserving work traditionally performed by its members. This argument runs as follows:

Facts adduced during the later stages of the hearing show that the Local 3 members have been employed by a significant number of electrical contractors engaged in private telephone system installation in New York City. Even before the growth of private system installations which commenced with the Carterfone decision in 1969, the Local 3 members for many years had been employed by Bell System affiliates in Metropolitan New York in public telephone work. Certainly, since the early 1970's the Local 3 members have received instruction and training in the installation and maintenance of a great variety of electromechanical and, more recently, electronic switches manufactured by leading companies in the private installation field. The Union itself has conducted training for its members interested in entering the field. Certain of its members have even learned the intricacies of certain Ericsson switches while working for certain distributors, including a smaller, electronic switch related to the one used on the Hospital job. A Local 3 member testified that through the use of Ericsson's technical manuals and based on his own extensive experience, he could install such a switch with a minimum of engineering supervision. Thus, whether the work in dispute is broadly (all telephone switches or all such switches used in private installations) or more narrowly (up-to-date electronic switches) defined, the Local 3 members have traditionally performed such work. The argument continues that work preservation is necessarily a primary goal. Pressure undertaken against a contracting employer, Allran, to preserve this work traditionally performed by unit members, defined as those employed in the industrywide unit of which Allran is a part, aims at benefits for those members. In such circumstances, the Union's attempt to enforce its policy of the total job is intended to preserve unit work, and is not converted into a secondary boycott merely because it may have secondary effects on other employers, such as Ericsson in this case.

Whether the unit is viewed broadly or more narrowly, and whether because of changing technology and the alleged special nature of the Ericsson switch as representing the most advanced "state of the art," the work in controversy is viewed as being beyond that traditionally performed by the Local 3 members, as contended by the General Counsel,[47] I am satisfied that Local 3's attempt to obtain the switch work, which, as a matter of policy, Ericsson has uniformly reserved for its own employees, manifests an unlawful secondary object.

The Supreme Court, in *N.L.R.B.* v. *Enterprise Association of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Machine & General Pipefitters of New York and Vicinity, Local Union No. 638 [Austin Co.]*, 429 U.S. 507 (1977), resolved in the Board's favor the validity of its longstanding approach in determining the legality of the union's conduct, of weighing along with the other factors comprising the totality of the union's conduct the extent to which the immediate employer is in a position to satisfy the union's claim for work.[48] The Court cited with approval the Board's then most recent analysis of the factors which must be addressed to determine whether the pressured employer's contract right to control the work at issue makes that pressure primary or secondary.[49] The Board looks to whether under all the sur-

[44] *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612, 644 (1967).

[45] *National Woodwork Manufacturers Association* v. *N.L.R.B.*, *supra* at 645.

[46] See *N.L.R.B.* v. *Denver Building and Construction Trades Council*, 341 U.S. 675, 689 (1951); see also *International Longshoremen's Association, AFL-CIO, Local 1694 (The Board of Harbor Commissioners, Wilmington, Delaware)*, 137 NLRB 1178.

[47] Ericsson's chief teacher and instructor in the installation and maintenance of Ericsson's telephone interconnect systems, Leslie Schronbun, testified at length to the special, if not unique, nature of the company's most recent developments in electronic switching (utilizing its own manufactured, designed, and patented processor) which requires formal schooling at Ericsson's own schools as a minimum requirement for competency in installing and maintaining the highly sensitive electronic mechanisms which only recently, since 1979 or 1980, have come to predominate in the field.

[48] See cases cited in *Austin Co.*, *supra* at fn. 13.

[49] See *Local Union No. 438, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (George Koch Sons, Inc.)*, 201 NLRB 59 (1973), enfd. 490 F.2d 323 (4th Cir).

rounding circumstances the union's objective was work preservation and then whether the pressures exerted were directed at the right person; i.e., at the primary in the dispute. The study of such circumstances includes not only the situation the pressured employer finds himself in but also how he came to be in that situation.[50]

Here, Allran was seeking entry into the telephone system portion of the electrical industry. Ericsson was seeking to install its telephone systems in the New York City market with certain safeguards it chose to maintain to insure from its point of view the reliability and efficiency of its products. Allran's expectation was to gradually increase the portion of the work it received on Ericsson product installations, as its employees gradually increased their skills through experience and training. There is no suggestion in the record that Allran had any authority to determine the degree to which its employees at the Hospital would install and maintain the switch and related devices used on the job or that its business relationship with Ericsson was anything less than arm's length.[51] Nothing in Allran's collective-bargaining agreement restricted or prohibited Allran from bidding on partial jobs such as the one at the Kings Highway Hospital. Local 3 recognized Allran's contractual right at and after the June 11 meeting.

Yet, Gillin also was aware that only through a modification of Allran's existing contractual arrangement with Ericsson could Allran obtain the jurisdiction over the work the Union sought. Gillin never became satisfied that Allran had achieved sufficient control as a result of its negotiations with Ericsson to provide the Local 3 members with the installation and maintenance work on the ASB-900 switch which was the Union's goal. In fact, none of the parties involved, Michaeloff, Whitelaw, or Gillin, ever voiced confidence that Allran could take over the complete job at the hospital site, primarily because of Allran's lack of experience and technical skill. Thus, Local 3 pressure on the employer unable to satisfy the Union's demands had to lead, inevitably, to change or cessation of the business relationship between Allran and Ericsson, and a disruption in their mutual goal of future development and growth in their business relationship.

The Union may have had a work-preservation object, but by its attempt to acquire the particular work of installing Ericsson-made electronic switches, which its contacting employer, Allran, had no power to provide, its tactical objects necessarily included influencing Ericsson and thus became secondary in nature.[52]

The Supreme Court's conclusions in *Enterprise Association, Local 638*, sustaining the Board's approach where the right of control of the work in dispute is at issue, has been most recently reaffirmed in *N.L.R.B.* v. *International Longshoremen's Association, AFL-CIO* [*New York Shipping Association*], 104 LRRM 2552, 2557 (1980), where the Supreme Court noted as follows:

> Among the primary purposes protected by the Act is "the purpose of preserving for the contracting employees themselves work traditionally done by them." *Pipefitters, supra* at 517. Whether an agreement is a lawful work preservation agreement depends on "whether, under all the surrounding circumstances, the Union's objective was preservation of work for [bargaining unit] employees, or whether the agreement . . . [was] tactically calculated to satisfy union objectives elsewhere . . . . The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer *vis-a-vis* his own employees." *National Woodwork, supra*, at 644–645 [footnotes omitted]. Under this approach, a lawful work preservation agreement must past two tests: First, it must have as its objective the preservation of work traditionally performed by employees represented by the union. Second, the contracting employer must have the power to give the employees the work in question—the so-called "right of control" test of *Pipefitters, supra*. The rationale of the second test is that if the contracting employer has no power to assign the work, it is reasonable to infer that the agreement has a secondary objective, that is, to influence whoever does have such power over the work. "Were the latter the case, [the contracting employer] would be a neutral bystander, and the agreement or boycott would, within the intent of Congress, become secondary." *National Woodwork, supra*, at 644–645.

The Union's work-preservation contention and the pressured employer's inability to satisfy the Union's claims have also been addressed by the Circuit Court of Appeals for the Ninth Circuit in the following language:

> Whether an agreement or its maintenance constitutes a secondary boycott must be determined by reference to "all the surrounding circumstances." *National Woodwork, supra* at 644 . . . . An important factor in this determination is the "right-to-control" test which provides that "if an employer is not legally empowered to meet his employees' demand, then they cannot lawfully strike him for his failure to accede." *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 326.

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[50] *Id.* at 64.

[51] The proof is that Allran lost the major portion of its hospital contract to another electrical concern. In this connection, Local 3's belated raising of the "ally" doctrine is clearly lacking in merit. Even if Gilmore, Ericsson's project coordinator in the hospital job, had been proven to have been on Allran's payroll during the period of the dispute—a matter not established by Biancanello's attributing to Michaeloff a statement to that effect—Allran was neither performing struck work, nor was it commonly owned or controlled to the extent of constituting, with Ericsson, a single employing enterprise. See *Illinois Bell Telephone Company, supra* at 561.

[52] "Even though a work-preservation provision may be valid in its intendment and valid in its application in other contexts, efforts to apply the provision so as to influence someone other than the immediate employer are prohibited by §8(b)(4)(B). See *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323, 327 (4th Cir.)." *Enterprise Association*, 429 U.S. at 521, fn. 8.

> [The Union] argues that its objective here was work preservation and that *National Woodwork* authorizes any union activity with that objective. We believe *National Woodwork* must be limited by the right-to-control doctrine. A union's right to enforce a work preservation clause against an employer may extend only to work which is his to assign. When it is applied to work beyond the employer's power to give, a work preservation clause necessarily embodies a prohibited secondary objective.[53]

CONCLUSIONS OF LAW

1. By inducing and encouraging its members employed by Allran to engage in a strike or refusal in the course of their employment to perform services, and restraining and coercing Allran, with an object of forcing or requiring Allran to cease doing business with Ericsson, the Respondent, Local 3, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act.

2. Local 3 has not engaged in unfair labor practices within the meaning of Section 8(b)(4)(i) and (ii)(B) of the Act by any other conduct alleged in the complaint.

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Because of the continued reliance of members of Local 3, with the Local's approval, upon the bylaw obligating them not to permit other tradesmen to perform work within the Local's claimed jurisdiction as an inducement to engaging in unlawful secondary boycott activities seeking to protect claims to disputed work, my recommended Order will require Local 3 to cease and desist from applying its bylaws in such a manner as to induce or encourage its members to engage in unlawful secondary boycott activities, in support of its claim to the total job of installing and maintaining Ericsson's telephone switching system at the Kings Highway Hospital jobsite.[54]

Moreover, Local 3's proclivity for engaging in unlawful secondary boycott activity in connection with claims to disputed electrical work, including such work performed with respect to telephone systems installations, and the apparent ineffectiveness of past Board and court orders in those cases in preventing further similar violations of Section 8(b)(4)(i) and (ii)(B) of the Act, coupled with Local 3's reliance on a total job policy, particularly as applied to telephone interconnect work, convinces me that the Order herein requires Local 3 to cease and desist from in any other manner engaging in unlawful secondary boycott pressures to enforce its work jurisdiction claims on projects in which Ericsson or any other manufacturer, distributor, or installer of private telephone switching systems is employed as general contractor.[55]

ORDER[56]

The Respondent, Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO, Queens, New York, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Applying its bylaws in such a manner as to induce or encourage any member employed by Allran Electric Corp., or by any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal in the course of his employment to perform any services, or in such a manner as to restrain or coerce Allran or any other person engaged in commerce or in an industry affecting commerce, where, in either case, an object thereof is to force or require Allran, or any other person, to cease doing business with L. M. Ericsson Telecommunications, Inc., New York Division.

(b) In any other manner inducing or encouraging any member employed by a person engaged in commerce or in an industry affecting commerce to engage in action proscribed by Section 8(b)(4)(i) or (ii)(B) of the Act in connection with enforcing a work jurisdictional claim on projects on which Ericsson or any other manufacturer, distributor, or installer of private telephone switching systems is employed as general contractor.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Publish the complete text of the attached notice marked "Appendix" in a conspicuous place in its semimonthly publication, "Electrical Union World," or successor publication, however named, and mail a copy of said publication to each member of Local 3[57] and post copies of said notice in conspicuous places in its business offices, meeting halls, and all places where notices to members are customarily posted.[58] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by Local 3's representatives, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily displayed. Reasonable steps shall be taken by Local 3 to insure that said notices are not altered, defaced, or covered by any other material.

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[53] *Associated General Contractors of California, Inc.* v. *N.L.R.B.*, 514 F.2d 433, 437–438 (9th Cir. 1975), reversing 207 NLRB 698 (1973). Of course, Local 3's argument here is predicated not on a work-preservation clause, but on a work-preservation demand embodied in its total job policy. The difference is not significant for application of the principle enunciated in *ILA* and *Associated General Contractors, supra.*

[54] As noted in *IBEW, Local No. 3*, 205 NLRB 270 (1973), the bylaw itself may be otherwise validly implemented and thus only its application under the instant facts is subject to lawful restraint.

[55] See *International Brotherhood of Electrical Workers, Local 501 [Samuel Langer]* v. *N.L.R.B.*, 341 U.S. 694, 706 (1951).

[56] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[57] In accordance with par. 2(a) of the Order modifying the recommended Order of the Administrative Law Judge adopted by the Board in *Local Union No. 3, IBEW (Eastern States Electrical Contractors, Inc.)*, 205 NLRB 270 (1973).

[58] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Sign and mail copies of said notices to the Regional Director for posting by Allran Electric Corp., if willing, at places where notices to its employees or the Local 3 members are customarily posted.

(c) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Local 3 has taken to comply herewith.